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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 RYAN KARNOSKI, et al.,

11 Plaintiffs,

12 v.

13 DONALD J TRUMP, et al.,

14 Defendants.

CASE NO. C17-1297 MJP

ORDER ON LCR 37 JOINT
SUBMISSION REGARDING
DOCUMENTS WITHHELD BY
THE GOVERNMENT AS NON-
RESPONSIVE

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16 The above-entitled Court, having received and reviewed the LCR 37 Joint Submission
17 Regarding Documents Withheld by the Government as Non-Responsive (Dkt. No. 449), the
18 Government's Surreply to Plaintiffs' Reply (Dkt. No. 452), all attached declarations and exhibits,
19 along with relevant portions of the record, rules as follows:

20 IT IS ORDERED that the Government's motion to strike Plaintiffs' reply for violation of
21 LCR 37(a)(2) is DENIED.

22 IT IS FURTHER ORDERED that the motion to compel the production of documents
23 withheld by the Government as non-responsive is GRANTED:
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1 (1) The Government will produce, by **March 14, 2020**, all documents previously
2 withheld from families of responsive documents and for which the Government
3 produced a “Withheld for Non-responsiveness” slipsheet.

4 (2) Going forward, the Government will be required to produce every non-privileged
5 document in a family of one or more responsive documents; the practice of inserting
6 “non-responsiveness” slip sheets will be discontinued.

7 **Motion to strike**

8 The Government moves, pursuant to LCR 37(a)(2)¹, to strike Plaintiffs’ reply section
9 because it is over-length. The motion is denied.

10 The rule permits “one half page for each reply” – although this is a unified pleading and
11 Plaintiffs are requesting essentially a single remedy (production of the withheld documents), the
12 motion spans multiple requests for production, each (as will be seen below) with their own
13 separate issues and rationale for withholding. Plaintiffs could have brought separate motions for
14 each of the discovery requests; they did the Court the courtesy of uniting them in a single
15 pleading. The Court will permit Plaintiffs separate allocations of space for their reply to each of
16 the issues, finding it inequitable and impractical to limit the entirety of their arguments to a half
17 page only.

18 Additionally, the Court notes that LCR 37 indicates: “The total text that each side may
19 contribute to a joint LCR 37 submission shall not exceed twelve pages.” LCR 37(2)(E).
20 Including their reply, Plaintiffs’ total submission does not exceed twelve pages. The Court finds

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¹ “The moving party’s reply, if any... shall not exceed one half page for each reply.”

1 Plaintiffs' pleadings within the spirit, if not the exact letter, of the rule.² The motion to strike is
2 denied.

3 **Motion to Compel**

4 This motion concerns the Government's practice of withholding, on the grounds of "non-
5 responsiveness," documents which are part of an otherwise responsive "family group" of
6 produced material; e.g., producing a responsive email, but withholding attachments to the email
7 on grounds of "non-responsiveness." *See, e.g.,* Dkt. No. 450, Barsanti Decl. ¶ 2, Ex. 1.

8 The Federal Rules of Evidence favor the *complete* production of non-privileged evidence
9 if some portion of the evidence is deemed responsive. ("If a party introduces all or part of a
10 writing or recorded statement, an adverse party may require the introduction, at that time, of any
11 other part – or any other writing or recorded statement – that in fairness ought to be considered at
12 the same time." FRE 106.) At least one court has found that the federal evidentiary rules create,
13 at minimum, a "presumption... that if something was attached to a relevant e-mail, it is likely
14 also relevant to the context of the communication." Abu Dhabi Comm'l Bank v. Morgan
15 Stanley & Co., No. 08 Civ. 7508(SAS), 2011 WL 3738979 at *5 (S.D.N.&. Aug. 18, 2011),
16 *adopted without objection*, 2011 WL 3734236 (S.D.N.&. Aug 24, 2011).

17 To hold otherwise is to permit the producing party to essentially unilaterally redact
18 otherwise responsive discovery. *See* Sanchez Y Martin, S.A. de C.V. v. Dos Amigos, Inc., 2019
19 WL 581715 at *11 (S.D. Cal. Feb. 13, 2019); Vireco Mfg. Corp. V. Hertz Furniture Sys., 2014
20 WL 12591482 at *5-6 (C.D. Cal. Jan. 21, 2014); Families for Freedom v. U.S. Customs &
21 Border Prot., 2011 WL 4599592 at *5 (S.D.N.Y. Sept. 30, 2011)("Context matters. The
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23 ² The Court takes the point of the Government's "one-page opening, eleven-page reply" hypothetical, and will only
24 comment at this point that such a strategy would *not* be "within the spirit... of the rule."

1 attachments can only be fully understood and evaluated when read in the context of the emails to
2 which they are attached. That is the way they were sent and the way they were received. It is
3 also the way in which they should be produced.”)

4 In reviewing the documents provided to them by Plaintiffs which Plaintiffs believed
5 showed “obvious indicia of responsiveness,” the Government responded that “the vast majority
6 (...over 95%) of the documents with the extension .msg in the file name were Outlook delivery
7 or read receipts,” and argues then and now (without citation to authority or further explanation)
8 that such “delivery and read receipts are not responsive to any discovery request and are plainly
9 irrelevant to Plaintiffs’ claims.” Barsanti Decl., ¶ 6, Ex 4. This Court disagrees and joins a
10 plethora of other courts which have found that electronic read receipts have relevance on the
11 issue of whether someone received information which was sent (a highly relevant issue when
12 examining a witness at deposition or trial who denies or claims no recollection of having read a
13 particular communication). *See Azeveda v. Comcast Cable Communic’s LLC*, 2019 WL
14 5102607 at *2 (N.D. Cal. Oct. 11, 2019); *Solomon v. Jacobson*, 2016 WL 6156189 at *2 (C.D.
15 Cal. May 25, 2016); *Metro Gov’t of Nashville v. Davidson Cty*, 432 F.App’x 435, 452 (6th Cir.
16 2011).

17 A portion of the withheld material concerns service members’ gender dysphoria medical
18 treatment plans and documents related to the cost of gender transition surgeries or insurance
19 coverage for such surgeries. Regarding the individual treatment plans, Defendants object on the
20 grounds that they “have already produced or agreed to produce the inputs to the Panel of Experts
21 [involved in the formation and implementation of the Ban], including all deliberative documents
22 and communications related to the work of the Panel of Experts that were sent, received or
23 presented to any member of the Panel during the decision-making process.” Dkt. No. 449, LCR
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1 37 Joint Submission at 12. But the documents which Plaintiffs received from Defendants and
2 then reviewed were culled from “material reasonably related to the formation and
3 implementation” of the Ban. Dkt. No. 371-1, 8/29/19 Easton Decl. (Plaintiffs describe them as
4 “attachments to communications between individuals supporting the Panel and even member of
5 the Panel itself.” LCR 37 Joint Submission at 7.) If individual treatment plans were transmitted
6 to Panel members in advance of the creation of the Ban, they are relevant and responsive.
7 Additionally, this Court has previously found that medical documents such as these are relevant
8 to the formation of the policy. Dkt. No. 421, Hearing Transcript at 50:1-14.

9 Regarding the evidence (found in file names of withheld attachments, etc.) that
10 documents related to the cost of gender transition surgeries or insurance coverage for such
11 surgeries were withheld as “non-responsive,” the Government defends its decision by explaining
12 that the documents related to the “private sector,” with no further explanation of how that renders
13 them categorically non-responsive when it appears that they were considered in the formation
14 and implementation of the Ban. If they were exchanged and analyzed in the course of
15 developing the policy at issue in this lawsuit, they are relevant and responsive.

16 Defendants interpose, at several points in their argument, the FRCP 26 argument that the
17 discovery requested by Plaintiffs is overly burdensome. The Court is not persuaded. In the first
18 place, the Government makes no attempt to detail in what way the production of the withheld
19 material would be burdensome (e.g., evidence of associated time or cost). As regards both the
20 read receipts and individual treatment plans, it appears to the Court that the Government has
21 already gathered the material, thus the burden of producing it should be relatively *de minimis*.

1 **Conclusion**

2 Defendants' motion to strike is denied. Plaintiffs' motion to compel the production of
3 documents previously withheld by the Government as non-responsive is granted. The
4 Government will produce, by **March 14, 2020**, all document previously withheld from families
5 of responsive documents and for which the Government produced a "Withheld for Non-
6 responsiveness" slipsheet. Going forward, the Government will be required to produce every
7 non-privileged document in a family of one or more responsive documents; the practice of
8 inserting "non-responsiveness" slip sheets will be discontinued.

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10 The clerk is ordered to provide copies of this order to all counsel.

11 Dated March 4, 2020.

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13 Marsha J. Pechman
14 United States Senior District Judge
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